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HEARINGS

Before The

COMMITTEE ON PUBLIC WORKS

UNITED STATES SENATE

AIR AND WATER POLLUTION

EXECUTIVE SESSION

Washington, D. C.

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EXECUTIVE SESSION

AIR AND WATER POLLUTION

TUESDAY, OCTOBER ¹⁹~~20~~, 1971

United States Senate,
Committee on Public Works,
Washington, D. C.

The Committee met, pursuant to recess, at 9:00 a.m.,
in Room 4110, New Senate Office Building, Honorable Randolph
Jennings (Chairman of the Committee) presiding.

Present: Senators Randolph, Muskie, Boggs, Eagleton,
Tunney, Cooper, Buckley, Baker, Bentsen, Stafford and
Jordan.

Senator Randolph. Good morning, gentlemen.

I think it is best always for your Chairman to say
on an almost official basis, that I am a little late this
morning, frankly, because Senator Muskie and I have been
talking about this bill.

He is the Chairman of our Subcommittee on pollution,
and we have not had the opportunity as we would like to have
gone into some of the pending problem matters, so we started
rather early this morning, and I did check here about 9:10,

1 and there were only two members, and I just want you to know
2 ordinarily I do not try to be late, I attempt to be on time,
3 but I felt I should let you know exactly what we have been
4 doing this morning, just chatting about these matters, as I
5 am sure other members have been going over the matters of
6 concern.

7 I believe, Leon, that we have an agenda here, and that
8 we can move in connection with Section 402, if that is agree-
9 able to the members of the Committee, starting that way.

10 I appreciate your understanding to those of you who
11 have been here for a few minutes before we start.

12 Mr. Billings. Mr. Chairman, the language, page 129,
13 the language which appears on Section 402, page 129 and there-
14 after, the language which appears in the print is a draft which
15 is based on the recommendation by Charles Rowe, in the Attorney
16 General's office in the State of Washington, he is responsible
17 for the enforcement of the State of Washington Water Pollution
18 Program, the issue in controversy relates to the requirement
19 on page 134, the provision on page 134, Subsection (e), whereby
20 the Administrator can review the individual permit by the state
21 to determine whether or not the conditions imposed were such
22 that the permits are consistent with the requirements of the
23 Act.

24 This review takes place in those instances in which
25 the Administrator has delegated the permit issuing authority

1 to the states under the preceding subsection.

2 As you will recall, on Friday last, the witnesses from
3 New York, and apparently in support of others, suggested
4 this is unacceptable to the states.

5 Senator Jordan. Does this paragraph take control
6 completely out from under the states?

7 Mr. Billings. No, Senator Jordan.

8 A brief history, under the present situation, without
9 even enactment of this Act, the Administrator of the Environmen-
10 tal Protection Agency has the authority to issue permits
11 setting effluent standards for any industry discharging into
12 the Navigable waters of the United States, and has no authority
13 to delegate that responsibility to the states.

14 Under the provisions suggested in the draft, the
15 Administrator would be given authority to delegate permit
16 authority to the states, if the state's program is found to be
17 adequate, but he would retain the authority to review and
18 impose additional conditions on state permits, which do not
19 reach the requirements of the Act.

20 Senator Muskie. I wonder if I might add to that, I
21 thought we had a very useful and constructive meeting with
22 Mr. Ruckelshouse and his people on this whole question of the
23 permit program.

24 Senator Jordan. That was here?

25 Senator Muskie. Yes, and if you will recall, for most

1 of this year, we have been frustrated by our inability, and
2 the Administration's inability to compose legislative language
3 which would accommodate the water standards program under which
4 we have been operating, and which we are trying to strengthen
5 in this bill, for the permit program authority, which is
6 asserted by the Administration last year, on very modern
7 interpretation of the 1899 Act, and the Administration has
8 felt right along that it should continue to assert that author-
9 ity, that it was the best possible program to come to grips
10 with the big industrial pollution problems across the
11 Country, and we intended to do so.

12 It was my feeling that we ought not to pull the rug
13 out from under that authority, that this was the Administration's
14 decision, and the Administration is in the midst of implement-
15 ing that authority and developing the guidelines.

16 As I understood Mr. Rucklehouse's position, it is
17 this, that they felt we ought to proceed with that program for
18 the next few years, maybe up to five years, in order to come
19 to grips with the big industrial problems, and in so doing,
20 develop public policy which would have a beneficial effect
21 on state programs to control the smaller polluters, the least
22 significant ones, and so his suggestion was that we write
23 this Act in a way that would not undermine that authority,
24 and be permitted to go forward, and it was his objective
25 eventually to begin delegating permit authority to the states,

1 as they developed capacity to do so, and as they did so, the
2 authority would be picked up by the states, so we would try
3 to write in here a continuing of the present permit authority,
4 structuring it to the development of a state permit authority,
5 as far as the states were able to respond, and meet the
6 guidelines.

7 Now, as I see this developing, the states probably,
8 in the first five years, if they do a maximum job, would
9 really assume all practical control of the smaller polluters,
10 while the Administrator is moving into the bigger polluters,
11 and then you would have the transition period developing.

12 In order to do it that way, you have to write in
13 considerable flexibility.

14 You just cannot create one part for the Federal Adminis-
15 trator and another for the State Administrator.

16 You have to begin an evolutionary program which will
17 eventually develop a full-fledged permit program.

18 I do not think the Administrator can administer a
19 permit program that covers all polluters.

20 There are just too many of them, so I think you will
21 need the development of the program, but if it is done under
22 the overall supervision of the Administrator, with the
23 Administrator setting policy for the big polluters, I think
24 you have the best climate to take advantage of the administra-
25 tive capabilities of the states that respond.

1 I think a huge Federal bureaucracy is not what the
2 Administrator wants.

3 I do not think it would be good, I think it would be
4 unwieldly and unworkable.

5 With this sort of compromise, I think it would work
6 very effectively.

7 Senator Boggs. Mr. Chairman, if I may ask you a
8 question, I agree with everything you said there, but the
9 question is still in my mind that is being brought to us from
10 our state officials, and it is, does this mean that the
11 Federal authority, the EPA has a case by case review of each
12 individual one.

13 What I am trying to get to, to accomplish the same
14 thing you said, could we word it in such a fashion as to permit
15 the states to have the authority on the permit system, under
16 a criteria basis, and which would leave in the Federal Govern-
17 ment where they could assume the proper Federal authority to
18 indicate that the criteria had not been lived up to, and, there-
19 fore, the Federal Government would not support the issuance
20 of the permit?

21 Senator Muskie. I think what you are getting at, if I
22 understand the issue, there are two kinds of authority, that
23 involves the authority to review programs, the permit program,
24 and the other authority to review individual permits.

25 Now, if you divorce the two, it seems to me the

1 authority to review programs will be inadequate, if you cannot
2 get individual permits, because the effectiveness of the
3 programs depends on what kinds of permits are issued, and
4 whether or not they are effective.

5 If you put the burden on the Administrator to overturn
6 a state program, in order to get that, an individual permit,
7 it is unsatisfactory, you put a burden on him that he cannot
8 meet.

9 It seems to me what will happen, given the intent of
10 Mr. Rucklehouse, is that he ought to have both, that is the
11 authority to overturn state programs, it will not be used,
12 but he must have adequate authority to review the permits
13 issued under him.

14 I think as state programs are developed, the Adminis-
15 trator by and large, with the exception of the big polluters,
16 will delegate authority to the states, and he will receive
17 the individual permit, and there will be periodic audits and
18 reviews, but I do not think he will set up a separate hearing,
19 and separate procedure for reviewing and reconsidering every
20 permit that is issued, but I think he has to have the authority
21 to do that.

22 If his authority to overturn the state program is to
23 be meaningful, he must have the means to accomplish that.

24 Otherwise, in order to overturn a state program, you
25 will have to have such a widespread departure from guidelines

1
2 and individual permits, that he can make his case, so I think
3 the way it would develop, is that the individual, as states
4 develop permit programs, and they develop it under guidelines,
5 with respect to most permits, the Administrator will content
6 himself with a monitoring program, to review the general char-
7 acter of what the state is doing, but that he will retain the
8 right on a permit, that involves a big polluter that goes
9 beyond what ought to be permitted, and so on.

10 It seems to me that is the way it will be developed, and
11 I think we could spell that out in the report, that this is
12 the way we envision the thing developing.

13 Senator Cooper. May I ask this, on some point, at
14 the state development, as the state develops the program
15 that is acceptable, then the EPA can delegate to the state
16 full authority to manage the permit program.

17 Now, before that occurs, I think it is unlikely to
18 occur very soon, what has the state, what are the exceptions
19 then to the powers of the authority of the EPA to issue permits,
20 before such an event occurs?

21 Am I correct in saying that if the Corps issues a
22 permit prior to such time, or a state has issued such a
23 permit, they stay in force and effect, unless EPA decides that
24 it is not in effect?

25 Mr. Jorling. There would be several different

1 situations, after the date of enactment, and before a state
2 developed an adequate program.

3 If the state had a permit program, it would not be aff-
4 fected, except as the conditions to that permit were in
5 conflict with what the EPA would determine necessary under
6 its administration of the continuing permit program that was
7 initiated and would be carried on without much change after
8 date of enactment.

9 However, if a state refuses to certify a permit which
10 was being issued by EPA, EPA would be foreclosed from issuing
11 that permit, and that authority of the state to say to the
12 Federal Government, you cannot issue your permit, that would
13 be continued.

14 Another aspect is that each state would still be
15 required to file certification with the Administrator of the
16 EPA in this permit program, which should in most cases
17 set what the state believes the conditions necessary are on
18 the permit, and it is anticipated in conversations with the
19 people at EPA, they would in many instances, in many states,
20 adopt those conditions accepted by the state, as the conditions
21 to the state, to the effect they were adequate, and implemented
22 the sections of this Act, so there would be an inter-relation
23 of the states, but it would be through the permit program
24 rather than on their own authority.

25 Senator Cooper. I think this is the result that in

1 every case prior to the delegation of authority to the states,
2 it is that EPA has control, except in one case, you said,
3 that is where the state itself refused to issue a permit, then
4 of course, the EPA cannot review that.

5 Suppose a state made a mistake and refused to issue a
6 permit, and maybe the person is entitled to a permit, how
7 does that source person, does he have any rights at that
8 point?

9 Mr. Billings. Under the provisions adopted in the
10 1970 Act, if the state positively denies certification of
11 the permit, which places the applicant in jeopardy under the
12 Refuse Act, the recourse of the applicant is to the state
13 courts.

14 In the 1970 report, it was quite clear, that if this
15 was the relationship between the state and the discharger, and
16 if the state did not want him to go ahead, and it would
17 jeopardize his operation, he would have to settle it out
18 under state law.

19 Senator Cooper. Well, we should think about it, if
20 the EPA has the power to revoke a permit, as a matter of right,
21 and as a matter of determination, could the EPA also have
22 the authority to overturn a state's decision not to issue a
23 permit.

24 I just raise that question.

25 Senator Muskie. Let me just make this point, Senator

1 Cooper.

2 The state would not deny certification unless it is
3 felt that the permit, which is being proposed by the Federal
4 agency would jeopardize its water quality requirements.

5 On the other hand, the authority would be exercised
6 by the Federal Government to protect the water quality re-
7 quirements, in both cases the water, and I really do not think
8 if a state certifies a given permit, it would violate its own
9 water quality policies, and we would not want the Federal
10 Government to have the authority to undermine that policy.

11 Senator Cooper. I just wanted to make it clear what
12 the situation would be.

13 Senator Buckley. Mr. Chairman, There is one area
14 that does concern me, one, in terms of practicability, and
15 also in terms of possible costs.

16 If you have the states operating under a feeling that
17 they will be second-guessed by the EPA, that there is nothing
18 final until the sixty days after the state, and a particular
19 plant, over a period of months have ironed out an agreement
20 they think satisfactory, I understand the concern of the Admin-
21 istrator, that in certain large polluters, the consequences
22 of this application could be severe, and also, that the Admin-
23 istrator may have the nationwide experience available to him,
24 which is not necessarily available to the state, with respect
25 to a certain type of polluter.

1 Could we not involve the EPA or get the Administrator,
2 the ability to become involved earlier in the stage, in a
3 manner which would not displace the ultimate authority of
4 the state, but which would enable the Administrator to bring
5 his knowhow to bear in the formulation of the permit, speci-
6 fically supposing that in lieu of the sixty-days, that we
7 had a provision that upon receipt of an application, the
8 state would be obliged to send in a report to the Administra-
9 tor, giving the facts about the applicant, the nature and
10 size of his discharges, and then the Administrator would have
11 the ability to assign a technical advisor to the state to work
12 with the state in the development of the permit, but upon
13 issuance of the permit, he would have a waiting period.

14 This it seems to me would bring to bear the guidance
15 of the Administrator at a better level, and certainly because
16 the Administrator has the authority to revoke the permit
17 authority, if a state were to unreasonably disregard the
18 advice of the technical advisor, we would have that kind
19 of control that the Administrator is seeking.

20 Senator Muskie. Well, I may not understand your second
21 point fully, but if I do, I raise these two questions.

22 One, that kind of a provision would almost force the
23 Administrator to set up the staff, the bureaucracy to serve
24 every permit, and he has to assume he ought to get involved.

25 I believe what you are saying, unless the Administra-

1
2 tor is invited to come in, required to come in, if he wishes
3 to make an inquiry at the early stage before the permit is
4 issued, then in order to protect his interests, and his
5 responsibility, he will have to get involved in a greater
6 number conceivably, of permit applications than he would
7 under the formulation of the bill.

8 Secondly, if his input before the permit is issued is
9 advisory, he is consulted, then the permit is issued by
10 state authority, you have an indicator of what the role of
11 the Administrator would be in shaping the role of the permit
12 itself, but if notwithstanding, the input of the Administra-
13 tor at pre-issuance stage is there, and if the permit as
14 issued violates the recommendation of the Administrator, then
15 what recourse does have, for the permit is issued, such as
16 if the mineral conditions are not met, then what recourse
17 does the Administrator have at that point?

18 He cannot make a case on the basis of one permit, and
19 decide that the whole state program ought to be overturned,
20 he would not have sufficient grounds to do that.

21 It ought to be a pattern that a number of permits
22 are violating the standard, then it seems to me it is his
23 position, and his responsibility, to maintain the standards
24 of the Act.

25 I have no objection to making this technical advice

1 available to the states, but put it in such a way as to
2 protect his interests, and getting involved in every one,
3 I think he is involved in an administrative overload.

4 Senator Buckley. I do not think it would be anymore
5 of a problem than in the way it is now.

6 If he has somebody monitoring every permit issued
7 in the United States, yes, that is an administrative overload,
8 but if it is on a selective basis--

9 Senator Muskie. What I am saying, the kind of authority
10 you are setting up would exert greater pressure for him to
11 get involved in every case than the formulation we have here
12 in the bill.

13 The formulation we have here in the bill, if I under-
14 stand the whole thrust of it, Mr. Rucklehouse discussed this
15 here to the Committee, and it is that they would carve out
16 areas within which they would permit the states to exercise
17 delegated authority, providing they are satisfied the state
18 program is a viable and effective one.

19 They have the authority, but they would not exercise it
20 in every case, because they would be willing to rely on the
21 general policy of the state, but if you pinpoint the Adminis-
22 trator's role at the earlier stage of the permit situation as
23 it is at present, or as you propose, so he cannot say later,
24 now look, this permit was issued, it does not meet the stand-
25 ards of the Act, and the state would come in, well, why did

1 you not give us advice on this.

2 Senator Baker. Mr. Chairman, I do not want to unduly
3 interrupt the colloquy, but it occurs to me there ought to be
4 in practical application no substantial difference in either of
5 the two modes, because obviously, the Administrator has maxi-
6 mum authority and responsibility by possible review of every
7 single application for a certification or permit, just as
8 obviously he wants to have maximum impact, before the theory
9 outlined by Senator Buckley, you would have to have a total
10 revaiew.

11 I expect that will not happen in either case, and I
12 expect the size of the bureaucracy will be precisely the same
13 in either one.

14 It seems to me the central theme in this consideration
15 is one as Senator Buckley pointed out earlier in his three
16 concerns, one of moral, that is, is the state certification
17 program a collateral function of Federal authority, or is it
18 a state authority program.

19 I would suggest for consideration one other alternative,
20 and that is the possibility that the state would issue these
21 permits, that the Administrator, say within sixty days, post
22 issue, would have the authority to challenge the validity, or
23 appropriateness of such proceeding, in the courts, but not a
24 unilateral determination.

25 It would go more nearly to other state-Federal relation-

1 ship, where they are tested in one way or the other, to see if
2 they comply with the Federal guidelines.

3 The important thing one hears, at least from the
4 contacts that I have had, is that we do not destroy the efficacy
5 of the permit program under the Refuse Act, that that program
6 continue.

7 Number two, that we proceed to give as much delegation
8 of that authority as we can to the states, but it must be
9 real and meaningful authority, and, number three, the Federal
10 Government contain some modicum of power that is reserved
11 under this formula of delegation.

12 I think what we have can be improved on. I do not think
13 it ought to be the ultimate sticking point in the program, and
14 I think it ought to be changed in one of these ways.

15 Senator Muskie. I think to force the Administrator
16 to go into court, everytime he wants to challenge a permit,
17 is really bogging the program down, getting it down, and as I
18 understand what Senator Baker says, it is to give the states
19 the authority to issue permits, and if it requires the Admin-
20 istrator to dispose the Government to go to court to do so.

21 Senator Jordan. During this past week, I have done
22 a considerable amount of checking up on this thing in North
23 Carolina.

24 I think we have got good water resource government down
25 there, the Board, and so far as I know, everybody has to have

1 a license, and under that license, they have certain standards
2 to meet.

3 Well, all of the people that I have checked with, they
4 tell me that they are meeting the standards now set under the
5 law.

6 The Administrator told me, he said there was going to
7 be one standard, that they checked every single plant quarter-
8 ly, take the water from there to the laboratory to check it,
9 and they do not have a certain day to come.

10 They go in anytime, and they pick up the water.

11 Now, the people who have got these licenses, they
12 built their disposal plants under the standards to produce
13 a certain quality of water, and they are either meeting it,
14 or they are in violation, and if they are in violation, they
15 make them liable.

16 Under the state law now, they do not want to give this
17 up, and if the Federal Government takes it over, we will have
18 to have a Federal inspector come out, and we will load this
19 up with more problems.

20 Now, the Administrator down there is plainly unhappy
21 with some of the conditions in here now, as to where they will
22 fit in, and what they can do to administer the program.

23 They are doing a good job now, and they want to continue
24 to do it, and whatever the standards are that are set by this
25 new Act, they will have to have a certain standard of water,

1. and then it is up to the state to get it.

2 Senator Boggs. On that point, Senator, you just made,
3 let me ask Leon, whether it is a state permit system, or do
4 we get back to the review by EPA of each permit, and pick
5 out which ones they want to contest, or I might ask, is the cri-
6 teria of water quality written into the Act?

7 Mr. Billings. Section 304 would be the basis.

8 Senator Boggs. Whether it is a state permit or a
9 Federal permit, or what, the same criteria applies, so it is
10 just a question, really, of interpretation of that criteria,
11 and that gets me to the point, I do not want to weaken our
12 bill in any respect, I want to strengthen it in any way I
13 can in a practical way, but I do not want to pull the rug
14 out from under the Administrator or anybody else, but I was
15 wondering what effect, since either a state or the Federal
16 permit has to be given under the same criteria, what effect
17 would it have by deleting on page 132, Leon, Section 4, which
18 is a very brief --

19 On page 132, there are two sections, if I would delete
20 it, Subparagraph 4 on 132 and then on 134, delete Subsection
21 (e), all of (e).

22 Now, that would, as I understand it, I may be wrongly
23 advised, and I may not fully understand it myself, but that
24 would leave the matter to the state to issue the permits
25 under this criteria of the Act, but the authority would still

1 be in the Administrator to where the criteria of the Act was
2 not properly carried out in issuance of the permit by the
3 State authority to exercise his superior authority to review
4 the permit, and write different conditions in unusual cases,
5 where the state fell down on the job.

6 Senator Randolph. Let me comment, at least following
7 your thought, I have given some consideration to thinking
8 that after July 1, 1974, the individual review by the EPA
9 of permits would cease, but the program, the review program
10 would continue, if by that date of July 1, 1974, a state has
11 not demonstrated its capacity to issue what I would call
12 valued permits, the delegation would be revoked.

13 I think we leave with EPA their retention of authority,
14 there is the enforcement factor, but in reality, the state
15 would not feel that the Federal Government was looking over
16 its shoulder in a constant way.

17 In other words, we would give the opportunity for the
18 states to think in terms of some type of control, plus respon-
19 sibility, which they might accept up the line and do what
20 they must.

21 What is your thinking about that?

22 Senator Boggs. Well, I would be inclined to agree
23 with that, Mr. Chairman.

24 Senator Randolph. Who would like to comment on
25 my statement?

1 Senator Boggs. I think that the thing in here, along
2 that line, on page 134, that apparently galls the states, is
3 where they have to do this volume of paper work, I do not
4 know how many permits it would be in West Virginia, or say
5 in Delaware, this would be a thousand, but every one, all of
6 that paper work would be done by the state, and the state
7 would not be doing anything but forwarding it to the Federal
8 Government for review to be done within sixty days.

9 I think that is what galls the states. I was just
10 trying to eliminate that, and to have under the criteria of
11 the bill a strong bill.

12 Senator Jennings. What is your thinking, Senator Baker,
13 about my suggestion, does it have any appeal to you?

14 Senator Baker. Yes, sir, it does.

15 I have to confess, Mr. Chairman, I was reading the
16 Sections that Senator Boggs was calling my attention to, so
17 I apologize for trying to do the two things at once.

18 Let me make an inquiry.

19 Leon, could I have your attention, if you were to
20 adopt Senator Boggs' proposal, or the Chairman's proposal,
21 what would the residual authority of the Administrator be?

22 Senator Boggs. I want to know that.

23 Mr. Billings. As of July, 1974, the Chairman's
24 proposal, the Administrator for those states in which he has
25 delegated permit authority would be able to periodically review

1 the state permit effort, and if he found that to be
2 inadequate, he could revoke the delegation of authority.

3 He could not review each permit issued after July,
4 1974. He could not review the individual permits issued.

5 I understand Senator Boggs proposes immediately upon
6 delegation, he would forfeit the right to individually review
7 each permit.

8 Senator Baker. What you are saying is there is no
9 residual authority as far as individual permits remaining in
10 the hands of the Administrator in each proposal.

11 Senator Boggs. Let me say--

12 Senator Muskie. In the case of that, he could decide
13 not to delegate at all.

14 Senator Baker. Would not the Administrator still have
15 authority under previous legislation, not under the Refuse
16 Act, to move immediately for abatement of the discharge?

17 Mr. Billings. To the extent that Section 306 and 307
18 applies, yes.

19 Senator Baker. I do not think he can delegate that.

20 Let's make sure what you can and cannot delegate.

21 Mr. Billings. He can delegate authority to set the
22 new source performance standards.

23 Senator Baker. That is not under this Act, it is under
24 the previous Act.

25 Mr. Jorling. He also has that authority to delegate the

1 monitoring.

2 He does not have the authority to set impossible
3 requirements under toxic substances.

4 Mr. Billings. He would have authority under the
5 section which requires states to --

6 Mr. Meyer. One other thing, I understand Senator
7 Boggs' proposal, or the Chairman's proposal, he also would
8 retain the right to individually enforce a permit which
9 has been issued under the program.

10 Senator Jennings. I so stated. I think that is
11 important.

12 All he would be giving up under each, what he would
13 be giving up under each proposal is the right to review the
14 issuance of the permit.

15 Senator Baker. What about the right of the state
16 to enforce it?

17 Mr. Meyer. The state would have the right to enforce
18 it also. It is a dual enforcement all the way through.

19 Senator Jordan. You said they would have a right to,
20 but what would you say about a plant that is discharging its
21 effluent into a city system, what would you say about that?

22 Mr. Meyer. It is pre-treatment standards.

23 Senator Jordan. You said something about having the
24 right to determine what kind of effluent a plant could dis-
25 charge into a city?

1 Mr. Billings. The states are required to establish
2 so-called pre-treatment standards before the discharge into
3 the municipal system of industrial wastes.

4 There are certain industrial wastes that would kill
5 the bugs in a plant, which you would not want to have in
6 there.

7 Senator Jordan. All we are interested in, as I
8 understand, would be what quality of water is discharged,
9 no matter where it comes from, into whatever body it goes
10 into, it would be up to him to set that kind of requirement.

11 He would have to license these people to put their
12 effluent in.

13 Mr. Billings. Essentially that is what would happen
14 under Section 209.

15 Senator Jordan. How are they doing it now?

16 Mr. Billings. In many cases they are not doing it.
17 A fair occurrence of discharge of inadequately treated waste
18 does cause harm.

19 Senator Jordan. Still it is up to the city to see that
20 somebody does not destroy their own disposal plants.

21 I do not see why we should be --

22 Senator Bentsen. Restate the conditions under your
23 proposal, what you have really done after 1974, is it that
24 you have taken away the review authority of the Administrator,
25 but you have not taken away his enforcement authority if there

1 is a violation of conditions of the permit, which in turn
2 would violate the Act?

3 Senator Randolph. That is a correct assessment.

4 Senator Muskie. May I state that in another way, so
5 we can focus on it.

6 As I understand the Chairman's proposal, it is that
7 after July 1, 1974, if the Administrator delegates his
8 authority to the states, by the act to delegate it, he then
9 eliminates his own authority to review individual permits.

10 Now, I think one possible result of that would be the
11 delay of the delegation, because he feels very strongly that
12 he should have the authority with respect to large polluters,
13 and if he understands the effect of delegation to the states,
14 it would be to eliminate that authority over permits, he may
15 very well decide not to delegate this, and thus you may very
16 well as a result of this kind of legislation, inhibit him
17 from bringing the states in.

18 Senator Bentsen. I think that is a valid comment.

19 Senator Randolph. Yes. I have discussed that with
20 Barry two or three times.

21 Mr. Meyer. I think that problem can be defeated by
22 providing that the delegation is to take place upon application
23 of the state, that it in fact has a program which meets the cri-
24 teria of the Act, and request the Administrator to delegate.

25 He would have to make a finding the state did not in

1 fact have the authority, and then that determination, the
2 state and the administrator could have a go-round in a court.

3 It enables the state to say to the Administrator, we
4 are now of age, and we want our birthright, and he has to
5 positively act to deny it, and I think it would be a much
6 more difficult thing for him to do.

7 The discretion is not quite the same as him making
8 the determination, that the state is ripe, and, therefore,
9 he will delegate.

10 Senator Muskie. Now, if I get the whole thrust of
11 the administrative determination behind this Refuse Permit
12 Program, they are going to be very slow, I think, to give
13 that authority, once they have exercised it for three years.

14 I think they will be very slow to do it. You may have
15 a new Administrator then, and you may have all kinds of things,
16 but I would say this Administrator would be very reluctant
17 to hand over that authority in a permanent way.

18 Senator Buckley. Does not the Administrator retain
19 the residual authority to see that the state applies its own
20 standards, its own requirements?

21 Senator Muskie. To overturn it, he will have to
22 establish a pattern, a pattern of failure.

23 Senator Buckley. If a specific permit was issued in
24 violation of the standards, would not that be enough?

25 Senator Muskie. Not if I understand what these two

1 proposals intend to do, which is to eliminate the Administra-
2 tor's authority over individual permits.

3 I do not know whether under the general enforcement
4 authority you could still get at him or not.

5 Mr. Billings. He could enforce the conditions which
6 the state would impose, but he would not have the authority
7 to enforce conditions which are more strict.

8 Senator Bentsen. Is that right, would not the condi-
9 tions have to comply with the provisions of this Act, and
10 the conditions of this Act--

11 Senator Muskie. We are talking about eliminating some
12 authority that this provides over permits.

13 Mr. Billings. If the conditions imposed by the state
14 of the individual permit were inadequate, and the Adminis-
15 trator did not have the right to individually review each permit,
16 and require the imposition of more restrictive conditions, he
17 would have nothing to go against, except conditions that the
18 state had imposed.

19 Senator Bentsen. It seems to me the conditions would
20 have to come by the requirements of this Act.

21 Mr. Billings. What if they did not, and he did not have
22 individual review?

23 Senator Bentsen. I thought he had the right of
24 enforcement of the Act?

25 Mr. Meyer. Section 309 gives him clear all out authori-

1 Senator Cooper. As I understand, as far as the wording
2 is concerned, it holds and keeps the power forever in the
3 Federal Government, unless the Federal Government determines
4 otherwise, is that correct?

5 Now, unless in the discretion of the Administrator he
6 wants to turn it back, and for the practical purposes, there
7 is some language some place, that is as at some point, there
8 is a right to turn it back to the states.

9 Senator Muskie. The question is whether, you know,
10 the delegation be a matter of right, which the states can
11 acquire and demand, or whether it is going to be within the
12 discretion of the Administrator.

13 It seems to me you could fudge that over, either the
14 delegation is in control of the Administrator, or it can be
15 demanded by the states.

16 It seems to me what the Administrator has in mind,
17 he made this very clear and explicit when he was talking, the
18 reason he wants the Refuse Act Program is to control the major
19 polluters in the Country, and he wants to develop and
20 encourage states to develop a permit program at the same time
21 in order that the states can also deal with the small pollu-
22 ters, and that he can delegate the authority over the major
23 polluters at his own discretion, but I think if we were to
24 mandate, if we mandated he delegate authority with respect
25 to the minor polluters, he is also giving up authority with

1 respect to the major polluters, I think given to the present
2 state of mind, he would say never mind, I will not delegate
3 any of it.

4 Senator Buckley. Does he have the manpower to do
5 that?

6 Senator Muskie. He is going to encourage the states
7 to develop their program, and I think his review function
8 will be sort of routine, rather than in depth, with respect
9 to minor polluters.

10 I think he will look especially carefully on how the
11 states handle the major polluters.

12 Senator Schweiker. Mr. Chairman, I sort of agree
13 with the way this has been written, because by the nature of
14 air and water, it will always be a Federal problem, and I
15 think without putting the Administration in Federal hands,
16 still they will always be the final authority, it will be in
17 the Federal Government, the problem will never boil down to
18 the individual states, and I think, as to the administration,
19 the states are equipped to do the administrative job.

20 Senator Randolph. I do not take the Federal Government
21 out in my proposal.

22 Senator Schweiker. I understand, but just to hit a
23 few of the points made here, there is a great deal of difference
24 between the review and/or the original investigation, as far
25 as personnel are concerned.

1 Leave the states establish the facts, and make the
2 presentation, and I do not think we should have our noses
3 in it.

4 To me, as I understand it, as time proceeds, and as
5 they are equipped to handle the job, they are pretty much
6 going to do ninety-five percent of the deciding, but I
7 think it is absolutely essential, because I happen to know,
8 the time will come regardless of our enthusiasms of today,
9 when our various states will compete with each other, as
10 they always have, and people will fudge here, and fudge there,
11 and, of course, we get right back to the situation that
12 brings about our situation, so to me, this is a very happy
13 medium, and that is the reason why I think it is.

14 Senator Randolph. I think we must also face responsi-
15 bility, the Congress will have to provide the funds, and what
16 if the Congress does not do so, and the states have the
17 responsibility, without the dollars to do the job, what will
18 happen.

19 Senator Schweiker. You say the dollars to do the job,
20 they are getting the dollars from the Federal Government to
21 do the job within the states.

22 Senator Randolph. A promise, that is what they are
23 really getting.

24 The appropriations are not following the authorizations
25 in these fields of air and water.

1 Senator Schweiker. I think at least in most states
2 that have been involved in this, starting back from about
3 1965, at least Connecticut, at least in that part of the
4 Country, personnel-wise, they can handle what we are talking
5 about.

6 Maybe the states, some of them are not, but I do not
7 think that is a large expense, I really do not, what we
8 are talking about, in developing the facts.

9 I cannot foresee that we will be expanding our Clean
10 Water Commission anymore than what it is today.

11 I really do not.

12 Senator Baker. May I add a word of addendum, and it
13 will not be self-serving, because I think it will aid the
14 debate.

15 In the entire analysis, I have strong reservations
16 whether there should be any delegation of permit authority
17 under the Refuse Act as we are now recodifying it under
18 this bill, and I still have some reservations in that respect
19 for some of the reasons you outlined, for some other reasons
20 that get more obscure and complex, but once we have made
21 the issue to delegate, it is a question of how to do it, and
22 whether it is appropriate under the circumstances, and while
23 I still have my reservations, I also have reservations about
24 delegating, and then giving somebody authority in sixty days
25 to second guess, that is to let the states have authority to

1 issue a permit, then say, with this is what we think you can
2 give.

3 Senator Muskie. How about saying in the Act, that
4 the Administrator can waive his right to review in classes
5 of cases of permits, or totally, if he wants.

6 If he is sufficiently satisfied at some point, that
7 a state program is so good, he does not even have to review
8 the permits, let him waive that.

9 Senator Baker. I really prefer a system that does
10 not require that categorical determination in advance. I
11 would really rather see something in which the staff does not
12 translate these proposals into language that seldom mean what
13 I meant to say, but I would prefer a system that makes a full
14 delegation to the states, but retains in the Administrator
15 residual authority to review, not to wait sixty days, and
16 everybody shivers around to see if the shoe should fall, but
17 in those extraordinary cases, or in that situation, where there
18 has been abuse or violation of permit program concept, or it
19 is so obviously bad, that somebody has to do something, that
20 there is some sort of authority to review.

21 I have said more than I care to say, except to close
22 it down for my contribution in this way. If we are going to
23 have delegation, I think we ought not build in an institutional-
24 ized Federal Government looking over their shoulders, but
25 rather we should leave in the right of the Administrator, the

1 right to rectify various wrongs if they occur.

2 Senator Buckley. Mr. Chairman, I would like to make
3 some comments on Senator Baker's point of view.

4 I agree that the Federal Government has the responsi-
5 bility to protect the environment, water, air, what not, but
6 if we are going to delegate, we will have to delegate, and I
7 too feel that it should be the residual responsibility to
8 enable the Administrator, somebody to move, if the state
9 violates the approved program, but I do feel that the most
10 efficient way of letting the knowledge of some one represented
11 by the Administrator to be brought to bear, so to enable him to
12 know a review before the permit is issued, so he can get the
13 permit in, and guide the process of generating a permit.

14 Senator Baker. At the risk of cutting off someone, and
15 I do not mean to, except I see our distinguished Subcommittee
16 Chairman glancing at the clock, would it be possible for the
17 staff to prepare a proposal along the lines I have outlined
18 and consider it for this afternoon?

19 Senator Randolph. It is agreeable with me, I am
20 ready to be here this afternoon.

21 Senator Jordan. I am going back to the investigation
22 I made last week, with the state administrator, and I would
23 like to point out that they did have a check of every plant,
24 and in every town, and they were reading the standards, and
25 they require a lot of people, they have a lot of towns.

1 Now the Federal Government will get involved, and
2 you will have twice as many people.

3 I would say it is completely unnecessary, unless it
4 is a case of a violation, which would be brought to the
5 attention of the Administrator, they could go in and say, you
6 are not requiring this particular plant or city to meet a
7 standard such as this.

8 Senator Schweiker. This is the point, that Senator
9 Muskie brings forth, it would not require a staff.

10 The state will do the job.

11 Basically, as I envision this thing, as a matter of
12 practice, you will have some people reviewing most of the
13 paper work.

14 Obviously, you would pick out the ones where there is
15 some investigation that will be required, but it does not
16 require the personnel that would be required in the case of
17 an original agreement.

18 Senator Bentsen. One place where I am having a hang-up
19 problem with, I want the residual with the Federal Government,
20 and I want the right of review, but it has been stated the
21 right of review is only the condition of the permit as granted
22 and set forth by the state, but would not those conditions have
23 to also comply with the conditions of this Act?

24 Senator Muskie. There is no one to enforce it. I
25 agree they should, but who is to enforce that, unless the

1 Administrator has that authority?

2 Senator Bentsen. But he would have to have the right
3 of review, and --

4 Senator Muskie. Well, either the Administrator has
5 that authority to review the specific permits, to measure
6 them against the standards of the Act, or he does not.

7 Senator Bentsen. I am talking about review in the
8 exception, rather than review of every permit.

9 Senator Muskie. How will he identify the exceptions
10 unless he reviews them?

11 What I suggested earlier, the Administrator does not
12 want this whole burden.

13 It is clear from what he said, and he envisioned dele-
14 gating it pretty much to the states with respect to the
15 minor polluters.

16 It seems to me, we could meet a lot of the questions
17 that have been raised by simply providing that the Administra-
18 tor can within his discretion, delegate authority to the
19 states to issue permits, waive the provisions that Senator
20 Boggs has identified, on pages 132 and 134 for classes of
21 polluters, and for all polluters, whatever.

22 I am sure he will use that authority, and he is talking
23 about a five-year period of development, that by the end of
24 that time, he will have carved out administratively areas in
25 which the states will operate, without any review, or second

1 guessing by the Federal agencies, and maybe eventually a
2 delegation of authority over major polluters, and he wants
3 to retain that authority, and what I worry about with Senator
4 Boggs' suggestion, and the Chairman's about what we will do
5 is discourage him from delegating authority, or inhibit him,
6 and that I would hate to see.

7 I know it is a tough area, in which to legislate.

8 Senator Buckley. If a state feels that it will become
9 an administrative flunky of the Administrator, you might have
10 states say you take it over.

11 Senator Muskie. They have not felt that way about the
12 water quality standards program from the beginning.

13 It was clear from the beginning that the Federal
14 Government could move in.

15 Senator Bentsen. Let me say--

16 Senator Muskie. If a state did not come up with stand-
17 ards, the Federal Government, the Act provided that the Federal
18 Government could move in, and the states never have argued.

19 Senator Buckley. However, coming with a program that
20 is acceptable.

21 Senator Bentsen. Again, on an individual case basis.

22 Senator Muskie. Nevertheless, in terms of Federal
23 authority, as against state authority, it was pretty total,
24 and the states never argued.

25 It seems to me that what we are concerned about is

1 the cosmetics of reassuring the states, we could well write in
2 here a provision, as the Administrator delegates, he can waive
3 these provisions.

4 Senator Boggs. I think it is a good point.

5 Senator Muskie. And then we can say in the report,
6 it is as we understand what the Administrator has in mind,
7 and the Committee concurs, what we develop is Federal emphasis
8 on major polluters, Federal emphasis on stimulating development
9 of state programs, and gradually moving into the total area,
10 and we are giving the Administrator the right to do what he
11 told us he has in mind.

12 It seems to me in that way, in the report language,
13 the additional language here, really this would do what we all
14 have in mind.

15 I have fought for retaining the primary responsibility
16 at the state level.

17 That is what we wrote in the 1965 Act. We have main-
18 tained it ever since, and we have continued to do that, but
19 you do have to have the Federal authority, you do have to
20 have a national policy, and I think we can make clear the
21 philosophy of this provision of the Act, and we make it clear
22 the Administrator has the discretion to waive these provisions,
23 as he delegates, and our philosophy is clear, that we expect
24 him to do that, that we envision that is what he will do,
25 and we can strengthen that in the report.

1 Senator Buckley. Does everyone ever waive authority?

2 Senator Muskie. The whole water quality standards
3 act, everytime the Federal Government approves water quality
4 standards in the states, they are turning those standards
5 over to the state.

6 They have back-up authority to come in, and I think
7 that program is a good example.

8 Senator Bentsen. I suppose the highway department
9 would be an example of that.

10 Senator Boggs. I have had the privilege of serving
11 on the Agricultural Committee, and we had the meat inspection
12 bill, and we gave up the Federal authority. There were strong
13 bills in there, and it had a big impact on my little state,
14 but it made each state get up to a certain permit inspection
15 system, before the Federal Government gave them authority to go
16 ahead, and they got it within the last couple of months, as
17 a matter of fact, and the state has got enough inspectors
18 to carry on the meat plant inspections.

19 Senator Buckley. Does not the Federal Government have
20 to re-inspect every third batch?

21 Senator Boggs. I was trying to think of what happens.
22 The Federal Government just certified the system, but I think
23 it must have residual authority somewhere in the case of where
24 a state falls down.

25 Senator Jordan. The Federal Government pays for the

1 inspectors totally, and in that particular case, the Federal
2 Government is responsible to see that the plants maintain the
3 proper standard, but you do not have to do all of the inspect-
4 ing.

5 Senator Boggs. I think the Federal Government must
6 reserve some right.

7 Yes, it must retain residual authority, but it was a
8 big change.

9 It wiped out quite a few little plants.

10 Senator Jordan. It seems to me, I believe the states
11 already have enough rights that we have tried to take away
12 from them, but the Federal standards which the states have
13 to meet, and that the states do meet, we should be careful
14 that we do not superimpose a whole group of other people on
15 top of the states now than they already have.

16 The Rivers of North Carolina are classified A, B, C
17 depending on how big the body of water is, and a great many
18 things--

19 In other words, they are not imposing the same stand-
20 ards on a big river as they do on a small river.

21 Senator Cooper. I am trying to follow your reasoning,
22 Senator Muskie, the language is the Administrator delegates
23 all or nothing, either he accepts a state plan and delegates
24 authority, or he does not.

25 Following your proposal, could you write some language

1 saying nevertheless we could delegate, or as you say, waive
2 authority as to certain classification of sources?

3 Senator Muskie. I would have no objection to that.

4 Senator Cooper. The way it is now, it is all or
5 nothing.

6 He either delegates authority to the states, subject
7 to residual power, or he delegates nothing, but within that
8 authority, could we say that with respect to certain classifi-
9 cations of categories of sources, you could delegate, or
10 waive that authority.

11 In other words, that would identify specifically
12 small sources.

13 Senator Muskie. I think that could be done.

14 I would have no objection to that.

15 Senator Cooper. That would satisfy me.

16 Senator Jennings. Gentlemen, just bear with me a
17 moment.

18 There is a West Virginia minister that I have arranged
19 to be in the Senate with, to give the prayer at 11:00 o'clock,
20 and I have to meet that man, and his family and others at
21 quarter of eleven.

22 I can return here perhaps about 11:15, but I want you
23 to know the reason for my absence.

24 Senator Muskie. I will be glad to take over for
25 you.

1 Senator Baker. Put in a good word for me.

2 Mr. Meyer. In an attempt to provide for continuing
3 Federal presence, without going through the problem of
4 delegation, and all the issues that might be involved in that,
5 would it be possible to establish a program which says that
6 the state upon receipt of an application, for a permit, shall
7 notify EPA, that an application had been filed.

8 That application will have to require a fair amount
9 of important information.

10 At that point the EPA people will review the applica-
11 tion, and then it would be at that time they would make a
12 decision as to whether or not they would become involved in
13 the permit application.

14 It would start with the state, and they would carry
15 it all the way through until the permit was either granted
16 or denied, that way they can pick and choose at anytime,
17 whenever they want to, but they have to be from the beginning,
18 there would be no review as such, there would be a Federal
19 participation, and if they did not want to participate, because
20 there was a minor permit, they would opt out, and the permit
21 would be final upon issuance of the state.

22 Senator Baker. If they did?

23 Mr. Meyer. If they did opt in, they would have the
24 last say.

25 Senator Baker. Under the sixty-day formula?

1 Mr. Meyer. It would not be necessary.

2 Senator Baker. In effect this would be a two permit
3 system, one a pure state, and the other concurrent state-
4 Federal?

5 Mr. Meyer. That is right, and EPA would say, this is
6 an application for an important source.

7 Mr. Billings. Are you suggesting to abandon the
8 Federal permit program entirely?

9 Mr. Meyer. This would be under those states that
10 were not capable, you would still have to have the presence
11 of the EPA.

12 Some states may never be capable of handling the
13 job.

14 Senator Baker. That is a good proposal. That is all
15 right.

16 Senator Cooper. I do not like this thing of mixed
17 authority.

18 You would have fighting at the lower levels.

19 I started out as a states' rights' man, but I see now
20 the Federal Government has got to administer this thing.

21 At least I would go along with Senator Muskie on his
22 proposal, if he could write into it, instead of having all
23 or nothing, that the Administrator could give authority to
24 the states in certain categories of discharges of sources.

25 Senator Bentsen. I would disagree with the Chairman's

1 recommendation, if you want to see a lot of government
2 employees, then follow that route.

3 It takes a lot few people to review than decide to
4 administer by the exception that they do not concur with.

5 I would be inclined to go along with your suggestion.

6 Senator Muskie. If I understand what Senator Cooper
7 is saying, what we would write in is the authority for the
8 Administrator to delegate all or part of the Federal program,
9 and to waive these procedures, with respect to review, of
10 particular permits.

11 In other words, give him complete discretion to accept
12 part or all, or part of the state program, and to delegate
13 all or part of his authority.

14 Senator Baker. What happens to the residual
15 authority?

16 Senator Cooper. I think he should delegate authority
17 in certain cases.

18 Mr. Billings. He would retain his residual enforce-
19 ment, unless the statute required the permittee at all times
20 comply with the requirements of the Act, thus giving the
21 Administrator an opportunity to go to court, to enforce the
22 requirements of the Act.

23 I do not see how he would have residual authority on
24 those permits that --

25 Mr. Jorling. Except he can review the entire program

1 and revoke the delegation.

2 Mr. Billings. There is one option, when he did review
3 and revoke the delegation, he could also specify the permits
4 that were in fault, in his judgment, and re-open them.

5 That would be a residual authority, and in the case
6 where he did review and revoke delegation, he could go back
7 and look at the permits that were issued under the waiver.

8 Senator RANDOLPH. Just as a post-script on the
9 subject we were discussion, my grandfather, I remember, he
10 told me that you cannot tell what a man would do in a horse
11 trade on a Monday by the length of his prayer on Sunday.

12 Senator Buckley. How long does it take to negotiate
13 a permit?

14 Mr. Meyer. A tough permit could take every bit of a
15 year.

16 You have designs back and forth, as to whether this
17 engineering approach is proper, or whether this chemical will
18 harm, and they will go around and around on some of these
19 things.

20 Senator Buckley. So you would have lost two years, if
21 at the end of the sixty days, there is something the Adminis-
22 trator does not like.

23 Senator Muskie. The simple thing is to eliminate this
24 whole section, and proceed under the Federal Refuse Program.

25 Senator Baker. I think you are right. One is that we

1 can delegate, and it is something else not to delegate, but
2 we must find something in between, but I think we are moving
3 closer and closer to what we have now.

4 Senator Muskie. I think there is something in between
5 that is workable.

6 The idea that you have to freeze it in concrete,
7 that is not necessary.

8 I think you can give maximum flexibility, if you are
9 willing to rely on discretion, circumscribed as we are dis-
10 cussing.

11 I do not think it will be unworkable, and I rest my
12 case on the basis of the presentation of Mr. Ruckelshouse and
13 his people when they were here.

14 I was satisfied with that presentation, and I have a
15 clear idea of what he has in mind, and I think what he has in
16 mind is practicable, I think it can be made to work, and what
17 we ought to do is write some provisions that will enable him
18 to move in the direction he outlines.

19 Well, to get the thing to some kind of a vote, and
20 anything I propose is of course subject to any motions to
21 amend, but I think we ought to focus on decisions.

22 I would propose to amend the Committee print of this
23 section in accordance with Senator Cooper's suggestion, that
24 is that we clearly indicate the intent of this act is to give
25 the Administrator authority, and he should exercise his dis-

1 cretion to carve out areas of permit authority, that he will
2 delegate to the states, to carve out areas which he can waive
3 procedures, as Senator Boggs outlined earlier, so that we
4 set in motion a process of developing and stimulating the
5 state permit program.

6 I would like to propose that.

7 I do not have the language, but I think it is clear
8 what we have in mind.

9 Senator Jordan. Under what authority are cities issuing
10 permits, because they are now.

11 I know you had to get a permit, where it was so com-
12 plicated, they did not know what was in it, and so they came
13 out with a simillied form, and it took them weeks and a lot
14 of money to fill out the forms.

15 Under what authority are these people being licensed
16 now?

17 Mr. Billings. Under the Refuse Act of 1899, and under
18 any applicable state law.

19 Senator Jordan. In doing that, they have set standards
20 for the effluent now.

21 Mr. Billings. In some cities, in approximately twenty
22 cities.

23 Senator Boggs. The Federal standard is secondary
24 treatment, isn't it, to get a permit?

25 The Federal standard, they way they are looking at it, to

1 get a permit, you have to have up to secondary standards.

2 Mr. Billings. That is correct.

3 Under the Refuse Act permit, they are trying to define
4 where the equivalent of secondary permit is.

5 Senator Boggs. In principle, I think I would support
6 your approach, Senator Muskie.

7 As a matter of common sense, I go along with you.

8 Senator Muskie. Are we ready for the question on
9 that proposal?

10 Senator Baker. I do not know what the proposal is,

11 Senator Cooper. As it is, again, it is all or nothing.

12 He either delegates full authority to the states, to
13 manage every kind of source, or nothing.

14 I think you should write it to provide, however, that
15 the Administrator is authorized to delegate to the state
16 appropriate authority with respect to classes or categories,
17 or sources, and to have the report spell out what it means,
18 in that it is the intention of the Committee that he should
19 do so.

20 Senator Baker. Does that leave in the sixty day
21 review provision, or take it out?

22 Senator Muskie. It leaves it in.

23 Senator Cooper. I think you have got to give authority
24 to somebody to run this program.

25 If you keep it mixed, he can delegate certain classes

1 of categories, in fact, the Administrator is still running the
2 program, but you are telling him he should make this effort
3 for several reasons, first, because you do not want to have
4 the Administrator build up a horde of people running all over
5 the Country.

6 Second, by giving some incentive to the states, they
7 do influence a great deal the character of the permits.

8 I think it is a kind of interim arrangement, which
9 will work while we are getting this program going.

10 Senator Baker. I am trying to get at whether or not
11 it is the authority of the Administrator to have sixty days,
12 to review it, or set it aside, continues or is eliminated.

13 Senator Cooper. I think it is being continued, but I
14 think in view of the fact, not having made a state, that the
15 state could run the program, not particularly that they will
16 go in, and review every permit for a six-man facility on the
17 banks of Buck Creek.

18 Mr. Jorling. At the time of approval, there could be
19 three conditions with respect to particular categories of
20 discharge sources.

21 The Administrator could make a complete delegation
22 to the State, with respect to particular sources--

23 Senator Baker. Are you describing what Senator Cooper
24 just proposed?

25 Mr. Jorling. Yes. A complete delegation, with respect

1 to categories of sources, and thereby negate the effect of
2 the sixty days.

3 Thereby it would not be applicable. The second case
4 would be where the Administrator on his own initiative waives
5 the classification for the sixty days, and the third condi-
6 tion, would be a retention of the sixty-day review for those
7 categories or classes which did not fall into either form or
8 category.

9 Mr. Meyer. Those conditions would be put in the
10 language?

11 Senator Baker. What is number two?

12 Mr. Jorling. If the Administrator said, let's assume
13 he made a delegation, because the State of Texas processed
14 more steel than any other state, and he makes a complete
15 delegation of steel sources to the State of Texas, and then
16 he said, well, I do not want to issue discharges for hotels,
17 hospitals, communities under 25,000, I will say I am waiving
18 my review of those.

19 Senator Baker. How does that differ from one?

20 Mr. Billings. One is where you waive category of
21 sources within a particular state.

22 The other is where the Administrator waives generally
23 his review of permit in any state, for a category of sources,
24 for cities under 25,000 people.

25 Senator Baker. All right.

1 Mr. Meyer. It could also be stated in terms of
2 delegating authority with respect to all sources which have
3 an effluent of less than 50,000 gallons a day, or however
4 he wants to do it.

5 He gets rid of all of the small things he wants to get
6 rid of.

7 Senator Baker. So there would be three circumstances
8 to design the relationship in the permit program, between
9 the state and Federal Government, one would be they could
10 make a general determination by class, that they did not want
11 to issue a permit for a particular state, not a community, but
12 a state, is that right, that is your condition number one?

13 Condition number two, the Administrator of EPA could
14 make a determination, in a particular case of undertaking
15 of nationwide applications, not state applications, such as
16 communities of 25,000 people or less, that he would make a
17 total reviewable delegation, and, number three, that in all
18 other classes of cases, the present language of the Committee
19 print would prevail, that is the state would do whatever it
20 will do, but its judgment and determination would be subject
21 to review by the Administrator for sixty days, and during or
22 at the end of that period, the Administrator could set it
23 aside.

24 Senator Muskie. Two would not apply, I gather, in
25 states that made no effort to develop.

1 Senator Baker. If the state was not a participant,
2 it would not apply.

3 Senator Muskie. If the state was a participant,
4 it would apply.

5 Senator Buckley. I would like to move an amendment,
6 that is, as to the nondelegated responsibilities, that we
7 adopt Senator Randolphs proposal, so that we avoid that
8 possibility, that after sixty days, you find a flaw, then
9 have to start the whole negotiations, and engineering over
10 again.

11 I would point out to allow the Administration to come
12 in, to work with the State, in the nondelegated areas, at
13 its option, that is, the Administrator, in the nondelegated
14 areas to come up with a permit, and once that permit is
15 issued, it is effective.

16 Senator Baker. You are proposing we adopt Senator
17 Cooper's and Senator Muskie's proposal on categories one and
18 two and on number three instead of having sixty days in which
19 to have to set aside, that EPA would by one method or other,
20 be kept fully apprised of the proceedings, as they progress,
21 and at the time of the issuance of the certificate, EPA would
22 have to declare its intention to intervene or not?

23 Senator Buckley. It could become involved in the
24 process at any point it wanted to.

25 Senator Baker. Let me make sure I fully understand, if

1 on the 59th day, if on the day before the permit is to expire,
2 EPA came in and said simply, we do not approve of the proposed
3 permit to be issued, would that be sufficient to it to stop
4 the issuance of the permit, so that EPA could go in the next
5 three months, formulate an alternative, or would they have
6 to formulate an alternative and propound it in the sixty
7 days?

8 Senator Buckley. I would like to see the Administra-
9 tor have the responsibility for moving in at the early stages
10 of the permit negotiations, to pre-empt that.

11 Senator Baker. Would you say that EPA, on the 60th
12 day, and before the issuance of the state permit, could serve
13 notice they wanted jurisdiction in a particular case?

14 Senator Buckley. The negotiations are finalized after
15 years of studies.

16 I am saying, after the application is filed, you have
17 sixty days in which the Administrator could say I want to play
18 a part, or I want to take over, so that industry does not have
19 to repeat the same things twice.

20 Senator Boggs. The State would then be inclined to
21 say, that after working along on the problem, say okay, you
22 will work on this, there is no point in wasting my time.

23 Senator Buckley. Maybe so, but it is better to do that
24 at the beginning rather than expend the entire energy and then
25 do it all over again.

1 In other words, reserving your present permit program.

2 Senator Baker. In category three, EPA would have the
3 authority at anytime to in effect take it back for any purpose
4 but not in categories one and two?

5 Mr. Billings. Senator Baker, the way the bill is
6 presently drafted, EPA would become involved in the proposed
7 permits.

8 In other words, the state would not have issued the
9 permit. It is proposed.

10 Senator Baker. I am saying EPA would have the authority
11 to take a case back before a state issued the permit?

12 Mr. Billings. Yes.

13 At any point, prior to the actual issuance of the
14 permit, and that really does not vary this law as it presently
15 says it, except the point in which EPA was to notify.

16 Under the proposal, the copies of the application goes
17 to EPA.

18 The sixty-day run on EPA starts from the date of
19 notice of the proposed permit, so that --

20 Senator Baker. The point I am making is this, Leon,
21 you must see the State go through the procedure, that it is
22 called to go through the issuance of the permit to satisfy
23 itself, that according to its own requirements, they then
24 issue a notice saying we will give you a permit if the Federal
25 Government does not stop us, and that is fairly demoralizing

1 and degrading to the state.

2 I have no doubt that we need to keep the residual
3 authority in EPA, and to avoid the demoralizing effect,
4 of public proclaiming we will do this if we are not stopped,
5 or I propose instead, or I am trying to formulate a proposal
6 that EPA would be fully notified of the proceeding, and
7 instead of publishing a state intention of to issue, if they
8 do not get stopped from issuing, we call on EPA to declare
9 their intention before the permit is issued, and give EPA full
10 authority, to take that case back, and determine that case,
11 and Senator Boggs may be right, once the Federal intervention
12 is there, the states may say you can have it back, but that
13 is infinitely--

14 Senator Muskie. Let me ask this question, it is all
15 right to be involved up to the point on a decision of issuing,
16 or not issuing a permit, but the question of what kind of
17 permit the state has in mind bears directly on whether or not
18 the Federal Government peers must be involved, so if you say
19 the Federal Government must waive, before the Federal Govern-
20 ment knows what the proposed conditions are going to be--

21 Senator Baker. I do not say that.

22 I would propose either by legislation or by any other
23 method, the full proceeding, including the proposed permit
24 be disclosed.

25 What I am trying to avoid is having a permit published,

1 and the state to publicly proclaim it will issue it, and then
2 say that is unless in sixty days EPA stops it.

3 Mr. Billings. You are saying that no state permit
4 shall be issued unless EPA has notified and has waived?

5 Senator Baker. And I will say no state can issue a
6 permit under any category until a full record, including the
7 full information has been fully disclosed to EPA.

8 Senator Muskie. I have no objection to that.

9 Mr. Jorling. The Air Act, we have a provision there
10 where it states it is subject to Federal substitution if the
11 Federal Government finds it to be inadequate, so the exact
12 same relation is proposed in the Committee print as exists
13 in Clean Air.

14 Mr. Billings. All this does, it involves EPA at the
15 point--

16 Senator Bentsen. We have a mechanical problem, that
17 the Administrator has to be continuously advised as to the
18 proceedings.

19 Would not that be burdensome?

20 Senator Muskie. Unless the Administrator has failed
21 to exercise his authority under the first two provisions.

22 Senator Bentsen. I understand that, but under his
23 provision, the Administrator would be continually advised as
24 to the degree of proceedings.

25 Is this not comparable to a court?

2 Senator Baker. EPA is really an appellate court, if
3 you follow the rationale of the Refuse Act, EPA is the court
4 of refuse jurisdiction, and is voluntarily relinquishing
5 its jurisdiction.

6 The situation does not raise in my mind the concern
7 you have expressed.

8 I think as a matter of practical fact, it will be a
9 fairly routine matter of EPA to be notified of the applications
10 remaining, under category three, and the action stage will
11 arrive when the state sends the permit up with the record,
12 and says this is what we propose to do, unless you object,
13 but if you object, tell us beforehand, so we do not get blasted
14 with the newspapers on conflict between the Federal Government
15 and the state.

16 Mr. Meyer. The real analogy is with the program, where
17 the program says, in practice, what happens is the state tells
18 the Federal local man, this is what we propose to do, and
19 they work back and forth, so that at the time the state does
20 in fact pass the papers to the Federal Government, they will
21 know exactly what the response is going to be, they have been
22 working back and forth, and all of the requirements the
23 Federal agency wants are cranked into the project to begin with
24 so you do not have this w-- of shortcircuiting the time.

25 You have continuous review rather than a post-review.

1 Senator Buckley. In category three, it gives the area
2 of the Federal Government the flexibility to say we are satis-
3 fied, it is competently handled, so we will not participate.

4 Senator Bentsen. You leave this purely to the option
5 of the Administrator.

6 Senator Muskie. I have no objection to that.

7 Senator Baker. I think that is the very best of all
8 of the suggestions.

9 Senator Muskie's proposal on category one and two and
10 this sounds all right.

11 Senator Muskie. The Committee is ready for the
12 question?

13 Do we need a roll call vote?

14 Do we agree?

15 Senator Bentsen. I might say that we agree.

16 Senator Muskie. All right. Then, without objection,
17 this formulation will be included.

18 Senator Jordan. Are you going to write up what we
19 have agreed to?

20 Mr. Billings. Certainly.

21 The next item on the agenda--

22 Senator Boggs. While you are on this section, Mr.
23 Chairman, let me ask this question.

24 Does this section replace the authority of the 1899
25 Act, and should the Committee also repeal Section 13 of the

1 1899 Act?

2 Mr. Billings. Or do we leave that question alone?

3 Senator Baker. We ought to do it, but we leave it
4 alone.

5 Mr. Billings. The problem, with the rules of the
6 House, if we repeal the 1899 Act, and then they enact a lousy
7 permit program, and then there is no way you can go back and
8 not repeal the 1899 Act.

9 Mr. Meyer. We were burned once on that.

10 Mr. Billings. If a satisfactory compromise is agreed to,
11 then we expect the 1899 Act to be repealed.

12 Senator Muskie. Let's go onto the next item.

13 Mr. Billings. Mr. Chairman, those two proposals
14 relate to Lake Michigan and New York, and Baltimore Harbor,
15 and they propose no discharge standard in those instances.

16 The Staff recommends the following language be included
17 in the bill, as follows:

18 "SEC. 511(d) Discharges of pollutants into the navigable
19 waters subject to the Act of 1910 and the Act of 1888 shall be
20 regulated pursuant to this Act, and not subject to the Act of
21 1910 and the Act of 1888 except as to effect on navigation
22 and anchorage."

23 That will give you program consistency.

24 Senator Muskie. Any questions?

25 Without objection, that is agreed to.

1 The third item, amendments, includes two by Senator
2 Randolph.

3 Are there any others we need to consider?

4 Senator Boggs. Mr. Chairman, I do not have an amend-
5 ment, but with Senator Cooper's consideration, we are at the
6 stage of waiting for Senator Randolph to get back, to
7 proceed with the agenda, and I did not know whether this was
8 the right time, I will do it whenever you wish, bring up this
9 question of contract authority versus appropriations.

10 I want to do it whenever you want to do it.

11 Senator Muskie. Well, then let's get into it.

12 Senator Boggs. We have to wrestle with it at sometime
13 or other.

14 Senator Muskie. That is correct.

15 Senator Boggs. We have some language proposed.

16 Senator Muskie. I wonder if we could have the presenta-
17 tion of this amendment by Senator Boggs.

18 Senator Boggs. This amendment we passed around, it
19 sounds very simple, to strike the contract authority presently
20 contained in this bill.

21 I am submitting this, not just as my own proposal, but
22 on behalf of Senator Cooper, and of others, and I see the per-
23 mit in the contract authority of the program; however, I do
24 believe that as we move along in this fast-changing technological
25 age we are in, especially in this field, and with the amounts

1 of money involved here, it probably may be of my concern, but at
2 least in the best interest of the program, of accomplishing
3 our goal, to have annual review by the Congress, and to put
4 some direction and weight and let the presence of Congress be
5 felt on the program each year.

6 If this was a subject matter that the public was not
7 particularly interested in, but yet was of great major impor-
8 tance, and there was no way to get public feeling on it, that
9 may be another thing to granting contract authority, but this
10 program, I think, everybody, school kids, everybody else are
11 interested.

12 The Congress has expressed interest in it, the
13 Appropriations Committee members are generally inclined to
14 cut back, I think they have taken a generous approach on
15 this, not necessarily generous, but have not had any
16 hesitation living up to authorization, and realize that this
17 is the needs at this stage of appropriations.

18 I just feel the contract authority, we would be possibly
19 cutting off a source of great strength, in going forward with
20 this program.

21 It is all cut and dry, the contract authority, for three
22 or four years, it is laid out there, and admittedly, and I
23 am advised, by the Management and Budget people, that they
24 are opposed to this idea, because it weakens the fiscal situation
25 that you are trying to maintain, but I think these other fac-

1 tors would support relying on authorization authority.

2 I am sure others have other things to add.

3 Senator Cooper, that is just my personal feeling. I
4 happen to be a member of the Appropriations Committee, as
5 well as this Committee, so I sense the Appropriations Committee,
6 I cannot speak for it, but based on its record to date, Mr.
7 Chairman, I am very strong in support of these programs, and
8 I cannot see where it would weaken its position, but neverthe-
9 less, by the fact that we review it each year, and the progress
10 we are making, what we are doing, it would be a good strength-
11 ening factor to the program.

12 Senator Cooper. Well, I would like to say, frankly,
13 Mr. Chairman, and to the Committee, that along with Senator
14 Boggs, I talked to representatives of the Administration, and,
15 frankly, I think they oppose the contract provision, and
16 their reasoning is this, on the fiscal situation, is that
17 while in the first two or three years, there might not be
18 a great impact upon the budget of the fiscal situation, as the
19 Committee on Appropriations would pick up the obligations,
20 and, of course, it would be underway, we would meet those
21 obligations, such as we do on the highway program, but because
22 of the contract provisions, which is an inducement for states,
23 and it is a good thing on one hand, to proceed with these
24 programs, and then at some point, two, three, four years from
25 now, you could have obligations presented to the Congress, and

1 to the Appropriations Committee, which has to be met, which
2 may be of immense proportion, and with very little control of
3 what you can actually spend.

4 Secondly, Senator Boggs has spoken of, in these first
5 stages, when technology is not available, to meet the require-
6 ments you want to meet in the second period, and the third
7 period, you might induce, it would not only induce, but it
8 would be cause for the municipalities to proceed with the
9 promise of contract authority, you would have to build a lot
10 of facilities, which would be effective only in the second
11 or third stage, and my further point is this, that we are
12 getting underway under a program, which is getting under way,
13 and as our discussions indicate here, particularly in the last
14 week, where we are uncertain ourselves, what will occur, in
15 the second phase, and third phase, and what the states will
16 come up with in their proposal plans, it could be wise to
17 wait a couple of years and see what the situation is.

18 In the meantime, I think the Appropriations Committee
19 has indicated its willingness to finance as far as is possible,
20 and even go beyond what we ever expected, to provide funds for
21 this program.

22 There is a difference between this and contract authority
23 under the highway program, in a practical sense.

24 The highway program operates under the trust fund. This
25 limits what the states will undertake, also their own resources.

1 are limited, and we have had a long experience in the highway
2 program, and the technology is not as difficult as in this
3 area, but I do not think, there are other types of contract
4 authority, our friends from the urban areas speak of the
5 Commodity Credit Corporation taking up the bill for our surpluses,
6 but there these things are all fairly simple compared to what
7 we are considering here.

8 I would think in two years it would give us a chance
9 to look at the situation, as it has come out of this Committee,
10 and I think we may differ once in a while, but I think this
11 is kind of a major question, and we have agreed on a number
12 of issues to get some agreement, I think all of us, some of
13 us will feel much better, that we could go out with the
14 standard up, at least most of us do.

15 Senator Muskie. Well, I do not think it is necessary
16 to belabor this issue.

17 I believe very strongly in the retention of the
18 contract authority.

19 The Administration asked for this in its 1970 Act,
20 in its proposals for legislation, and I think that as we con-
21 sider the magnitude of what we are trying to achieve in this
22 whole bill, the credibility and commitment of the Federal
23 program is very much, it is whether or not we move effectively,
24 and I might point out, even with contract authority in the
25 bill, it is that these sums will be available.

1 The Appropriations Committee has found ways in the
2 past of diluting the Contract Authority that has existed, and
3 conceivably would find the ingenuity to do so again, but
4 at least at the outset, we would say at least the Federal
5 commitment is there.

6 Secondly, I might point out, this is contract authority,
7 and the Administration, whoever is in the Administration,
8 would not necessarily utilize it at all, so that there is no
9 real ironclad commitment we could give to states and communi-
10 ties, but I do think we ought to give as strong commitment
11 as we can.

12 They all understand the changes the program might
13 stimulate along the way, in the Appropriations Committee,
14 or on the Executive level, the contract authority is suffi-
15 cient commitment to get the state and communities moving, and
16 I think we have got to, notwithstanding the recent generosity
17 of the Appropriations Committee, and I give Senator Ellender
18 and others working there, full credit, notwithstanding that,
19 I think in stretching out three years in advance, because we
20 are in the midst of the others, the assurance of stretching
21 this out would indicate that we mean business, particularly
22 when that assurance is coupled with the other provisions of
23 this Act, which are very tough, and very precise and very
24 clear, so I would like to see that commitment, it should not
25 be diluted by an elimination at this stage of the contract

1 authority.

2 That is my view. I do not think it is necessary to
3 get into extended argument over it.

4 It is an honest view on each side, and I do not object
5 to any discussion, but I think we might perhaps get to a
6 vote on it, and proceed to other provisions.

7 Senator Cooper. I am not leaving the battle, but I have
8 to go for a few minutes, but I will leave my proxy.

9 My position is as I have stated, and I would hope you
10 would yield.

11 Senator Muskie. Are we ready for the question on
12 this?

13 Call the roll.

14 (Whereupon, the vote was as follows:

15 Senator Randolph. No. (by proxy)

16 Senator Baker. Aye.

17 Senator Bayh. No. (by proxy)

18 Senator Bentsen. No.

19 Senator Boggs. Aye.

20 Senator Buckley. Aye.

21 Senator Cooper. Aye. (by proxy)

22 Senator Dole. (absent)

23 Senator Eagleton. No.

24 Senator Gravel. No. (by proxy)

25 Senator Jordan. No. (by proxy)

1 Senator Montoya. No. (by proxy)

2 Senator Muskie. No.

3 Senator Stafford. Aye. (by proxy)

4 Senator Tunney. No. (by proxy)

5 Senator Schweiker. No.

6 Mr. Meyer. The motion fails with a vote of five
7 "ayes" and nine "nays".

8 Senator Muskie. Now, I have asked the staff to prepare
9 a statement of declaration of policy, which does two things.

10 Will you distribute those?

11 It does two things. One, a slightly different formula-
12 tion of the 1985 deadline, which some of you may find helpful,
13 and then, secondly, I think it does have a useful purpose
14 in outlining the purpose of the Act, so I would like you to
15 look at it.

16 Senator Boggs. Where does this fit in the bill?

17 Mr. Billings. This will be 101.

18 It will replace 101 as approved the other day.

19 Senator Muskie. I would like to read it out loud,
20 on page two, there is the key language.

21 Senator Boggs. This is a statement of policy?

22 Senator Muskie. That is a statement of policy.

23 Senator Boggs. That is correct, I see that now.

24 Mr. Billings. There is a time in here where the
25 Administrator has to designate and set the effluent standard.

1 Senator Bentsen. Is the goal in here?

2 Senator Muskie. I do not think so. Some of these
3 things are specifically provided for in the legislation.

4 It is not a goal. It is actually offered in a provi-
5 sion later on.

6 I would have no objection to substituting the word
7 objective.

8 Senator Bentsen. I am just asking for clarification,
9 Mr. Chairman.

10 Does this mean by 1985, the discharge of industrial
11 pollutants, that we have had no effluent discharge by 1985,
12 is that mandatory?

13 Mr. Billings. No, sir.

14 Senator Bentsen. In what way is it not mandatory?

15 Why is it not mandatory?

16 Senator Muskie. Because the provisions of the Act do
17 not provide it to be mandatory.

18 It may be an objective would be a better word for
19 policy.

20 Senator Bentsen. You say that because you have the escape
21 provision that the technology is not available.

22 Senator Muskie. The operative provisions of the bill
23 go to 1981, and then there is that midcourse correction, which
24 focuses on what we need to achieve by 1985, but there are no
25 conclusions in the bill, as to what that will be.

1 Mr. Billings. Senator Bentsen, there are two other
2 things, the enforcement provision of the law says whenever
3 there is a violation of a permit condition, effluent limita-
4 tion, schedule or timetable compliance, the Administrator
5 shall notify the person in violation of such conditions,
6 and so on.

7 The only way I suppose you could construe that to be
8 enforceable, if you construe the schedule of timetable com-
9 pliance to include 1985.

10 Senator Baker. Not quite. I think that is literally
11 so, and the thing that concerns me is that by expressing a
12 national policy for elimination of pollutants by 1985, and
13 the first section of the Act, and in which a court would con-
14 strue every section of the Act as supportive of that policy,
15 and, therefore, any uncertainty within that respect would be
16 in the light of the stated objectives of the Act, which would
17 be to accomplish these particular purposes by that particular
18 day, so in reading the Act, on the basis of the four corners
19 of the instrument, I am not entirely sure we are not creating
20 a requirement that a court would not enforce by 1985.

21 Senator Bentsen. That is my concern.

22 Senator Boggs. If you took out 1985, and put a period
23 before it, would that change it?

24 Senator Baker. That would probably solve it.

25 Senator Muskie. Substitute the word objective for

1 the word--

2 Senator Buckley. It still gives the impression that
3 Senator Baker suggested.

4 Senator Muskie. If you leave out the date, I believe
5 a court will say you have to do it immediately, if it has that
6 effect.

7 Senator Buckley. There is something definitive about
8 1985.

9 The rule of reason seems to be applied to by the
10 judge.

11 Senator Muskie. I take it the rule of reason also
12 would apply to 1985, as well as it would to it without.

13 Senator Boggs. Mr. Chairman, did you say you were
14 willing to accept objective for the word policy here?

15 Senator Muskie. Yes.

16 Mr. Billings. There is no question that the elimination
17 of discharge is the pollutants by industry in the navigable
18 waters is technically feasible.

19 It is technically feasible right now.

20 By 1985, even if this were enforceable, if it were
21 assumed the court would require it in 1985, no more discharges
22 by industry into the navigable waters, industry would have to
23 make a decision, to recycle their own wastes, or to go into
24 a public system, or to go out of business.

25 Senator Baker. There is one other alternative, and

1 it is that if we leave out 1985 out from the statute, and
2 carefully state it in the Committee report, and state we
3 are uncertain how soon we can do this, but do it as soon
4 as possible, and the date we have in mind is 1985, and we
5 expect to continue to monitor the progression of the program
6 to direct future legislative effort.

7 Senator Bentsen. You say it is technically feasible
8 now, and obviously technically feasible in 1985, does the
9 language still come into effect where we take into cost
10 benefit ratios, social economic values that are involved, is
11 it still effective in the language in 1985 or not.

12 Senator Muskie. It is applicable.

13 Mr. Billings. To the extent it would be imposed, if
14 there was an attempt to impose a no-discharge standard.

15 Costs would be involved in phase two, of the controlled
16 program.

17 The compliance with no discharge, based on attainability,
18 in otherwise best available technology is complied with, those
19 involved by specific description in the information section,
20 on the instruction of members, a cost consideration, taking
21 into account cost of achieving that technology, so there is
22 a plant by plant evaluation of whether or not the technology
23 is available to achieve no discharge.

24 Senator Bentsen. I am not asking if technology is
25 available.

We agree it might be. I am asking if cost benefit

1 ratios is considered.

2 Senator Muskie. No, for this reason, there is no
3 where in this bill any provision to implement that statement.

4 Now, there is a 1975 deadline, 1976 deadline, which
5 does not encompass that.

6 There is a 1981 deadline which does not encompass
7 that.

8 In respect to each of those deadlines, the cost benefit
9 test is included.

10 After 1981, there is no operable provision to implement
11 1985.

12 If in 1986, assuming that Congress has legislated no
13 new policy, has done nothing about midcourse correction in
14 1977, if at that point the court says, the Congress said this
15 is the policy, so we will enforce it, notwithstanding, maybe
16 you get into that question, but I cannot envision we will go
17 through this fourteen-year period, and come down to 1985, the
18 court faces whether that is enforceable national policy.

19 This is set up as a target. There is no machinery in
20 the bill for enforcing it.

21 All there is in the bill of 1985 is a provision by 1977
22 we shall have a report of what it will cost us in terms of
23 impact, and so forth, to achieve that by 1985, so I just cannot
24 accept the assumption we will find ourselves in 1986, having
25 done nothing else, where the court confronted the question, can

1 we enforce that statement. I cannot accept that assumption.
2 It will not happen, so all we have done is set a target, and
3 whether or not a target is an enforceable provision of law,
4 that can close down a plant, the question will not arise
5 until 1985.

6 It cannot arise in any enforcement procedure prior to
7 that time, because we will not have arrived at the target
8 date.

9 Senator Baker. I would like to add something to the
10 question that someone put a moment ago, I believe Senator
11 Bentsen, with what effect this might have.

12 As I stated earlier, about the 1985 date, it is my
13 concern that the area of the Act, any area of the Act, which
14 does not carry a particular compliance date, or which there is
15 the statutory, the authority to extend, or change the compliance
16 date, or any area where there is discretionary authority on
17 the part of the Administrator, will be effective to an indeter-
18 minate extent about the statement of the 1985 objective.

19 I asked my staff to point out the section of the Act,
20 they point out the provisions of Section 301 in parrt, Section
21 302, which reads whenever in the judgment of the Administrator,
22 and so forth, anytime we run into any provisions where there
23 is any element of discretion, or uncertainty, it seems to me
24 the 1985 provision must be taken into account, the ones I have
25 in mind, they are 301, 302, 303, 306, 308, 307.

1 Mr. Billings. This is the 301 language.

2 Senator Jordan. I would like to ask a question.

3 I am going back to this statement of purpose here,
4 where it says discharge of pollutants.

5 Senator Baker. The thing I would like to point out
6 is one of the areas where there was uncertainty, or
7 ambiguity, and discretionary authority that might be
8 effective, it might be affected by judicial interpretation by
9 the 1985 date, and the staff had suggested, to me, there were
10 these sections of the bill that might be affected, the numbers
11 were given, and what I was doing was examining the provisions
12 of Sections 302 and 303, to see how that might operate, and
13 at that time, I was given a new Section 302, and I was trying
14 to read it.

15 In the revised version of Section 302, it seems to me
16 we have a situation that we often have, that the section
17 requires stating what cannot be done, that is, it cannot be
18 permitted to delay, but not stating what can be done, I am
19 not entirely sure that Subsection of 302 is completely free
20 from the mandate of the 1985 date.

21 In addition to that, this section 301, on page 2, 3(a),
22 the language is not later than January 1, 1981, and then refer-
23 ring again to Section 302, Subsection (b)(1), on page two,
24 which includes the language, including the attainment of the
25 objectives of this Act, the stated objective, to obtain

1 compliance for 1985, and then the last two lines on page two
2 of (3), Section 302, which is in parenthesis, including
3 attainment of objectives of this Act.

4 It seems to me we need to do one of two things, if we
5 are to fully consider the impact of the 1985 statement, either
6 we need to eliminate it from the statute and include it in
7 the report language, as a statement for underlying reasons for
8 this enactment, but not an operative section of the Act, where
9 it would be thoroughly and completely isolated from statutory
10 mandate, or we ought to go through the Act, section by section,
11 and make sure there is an insulation of the effectiveness
12 that 1985 is an operable section of the statute.

13 These are just a few handed to me by other members
14 of the Committee and by staff, and I make no pretense to such
15 an intimate knowledge of the bill, that I can say what would or
16 would not be effective by the 1985 date, but I have a fear it
17 could be not effective.

18 Senator Muskie. I have not checked out all of the
19 uncertainties, but on page two of Section 302, I just fail
20 to see how this in there, that there is any language there,
21 and this is the top of page two, Section 301, by any stretch
22 of the interpretation, that January 1, 1981, could be made
23 as no discharge requirement overriding the specifics of
24 2(a).

25 I just do not see that. It is pretty specific as to

1 what is required by January 1, 1985.

2 There is nothing in there to suggest the requirements
3 of 1985, that it can be accelerated.

4 Senator Baker. I do not pretend they can be
5 accelerated. I say what happens after that--

6 Senator Muskie. If what you are afraid of is the
7 uncertainty is to write into the operative language of the
8 bill, the policy date of 1985, you have to look at it, I do
9 not see by any stretch of the interpretation, 1985, can be
10 brought into Section 2(a).

11 As far as reference to Section 101 is concerned, that
12 language is not even necessary.

13 Mr. Billings. The staff makes one additional point,
14 paragraph 3(a) at the bottom of page three, it points out
15 the operation of upgrading the technology requirements.

16 Senator Baker. Let me tell you how I read that, if
17 I were a district judge, first of all, which I am not, and
18 will never be, but if I were reading that, I would say that,
19 one, Congress is presumed never to act irrationally, therefore,
20 Section 101 has some effect from a legislative point of
21 view.

22 I would say number 2, Paren 3, page 2 of 301, provides
23 specifically for the attainment of this, this would be the
24 judicial re-definment in furtherance of national objective
25

1 to attain the goal as outlined.

2 You have to read the two sections together.

3 Senator Muskie. There is no reference to Subsection
4 3.

5 Senator Baker. But we say that will be our objective
6 by 1985.

7 Senator Muskie. A target for 1985, cannot be inter-
8 preted to be a part of a provision, by its own specific
9 requirements.

10 You are dealing with January 1, 1981. It is pretty
11 specific.

12 Senator Baker. It is not that specific.

13 What happens after 1981--

14 Senator Muskie. All I am saying is what I said
15 earlier, even if you interpret the 1985 date as being an
16 enforceable operative provision, when will it be enforceable?

17 1986 or 1986, that is not 1981, so if it is not
18 enforceable until then, what is its operative effect?

19 It is an objective, and that is all.

20 Senator Baker. I understand what you are saying, and
21 I certainly understand the forcefulness with which you are
22 saying it, but it has nothing to do with what I am talking
23 about.

24 What I am saying, the Section you refer to, Section 2(a)
25 on page two, provides with great specificity what happens by

1 1981, but it makes no provisions for what happens between
2 1981 and 1985.

3 Senator Muskie. That is right.

4 Senator Baker. Therefore, the four corners of this
5 statute would be looked to if there were any other statutory
6 period relating to that period, and I think the state would
7 say after 1981, and before 1985, you must meet the stated
8 objectives of the statute.

9 Senator Muskie. Something else, that relates to the
10 midcourse correction in that, and I am not prepared to assume
11 the Congress is not going to do anything before 1981, to set
12 policy for the period 1981 to 1985.

13 Senator Baker. I am not prepared to assume the year
14 1985 is meaningless in terms of read in the totality of this
15 statute.

16 Senator Muskie. Whether or not it is meaningless, it
17 has an impact prior to 1981.

18 The purpose of 1985 is clear, and I do not think it is
19 violated by anything we have got here, that is to set a
20 national objective.

21 We think by that time we should have done a maximum
22 job, and we think that means insofar as it is possible, and
23 we will know what the possibilities are by 1977, we ought
24 to eliminate industrial discharges, pollutants into the naviga-
25 ble waters.

1 Now, if we are not talking about that kind of a
2 national objective for water quality, then what we are
3 talking about is meaningless, and I see nothing wrong with
4 setting a national objective that is a target.

5 I just do not believe it is not possible to indicate
6 it is a target.

7 Senator Baker. I fully support that, but I suggest
8 that is not what we have done.

9 Senator Muskie. There is a way out of this situation.
10 Why don't you submit the proposed language, and it is subject
11 to any amendments, and we can vote.

12 Senator Boggs. I wish Senator Cooper were here.
13 I would like to have his impression before we vote.

14 Senator Muskie. Why don't you submit your proposal,
15 and then we can decide whether we want to vote on it.

16 Senator Boggs. Could you comment on the difference
17 between the word policy there and the word objective, will
18 that lessen the impact?

19 Senator Muskie. I guess you would have to ask Senator
20 Baker.

21 I offered the word objective.

22 Senator Baker. I do not think it makes any difference.
23 It makes some slight difference, but the overriding concern
24 is the tradition of judicial interpretation of legislative
25 action, which says Congress never says useless things, there-

1 fore, Section 101 must mean something, and we have got to go
2 to the four corners of the instrument to decide what it
3 means.

4 Senator Muskie. I am also prepared to say that the
5 court is capable of setting national targets, but that is
6 not made operable immediately.

7 I do not think that if the Congress disputes a date,
8 that the courts will --

9 Senator Eagleton. Basically, the statement of purpose
10 section, and every bill has it, is the pious pronouncement
11 of a general policy of the bill, and it is not operable
12 per se.

13 Senator Baker. We have given room for the court to
14 interpret this, and if there is room, then we have failed.

15 Senator Tunney. What are you suggesting in the way
16 of language in Section 101 which would still leave the object
17 ive to be achieved by 1985 no discharge, but at the same time
18 overcome what you have stated?

19 Senator Baker. To adopt the suggestion Senator Potts
20 made, that we strike 1985, and we write it in the Committee
21 report, the fact we mean this to be a national purpose, it is
22 our hope it will be done by 1985, and we will monitor and
23 continue the examination of this field, and to see what
24 additional legislation is necessary to accomplish this, thereby
25 putting everybody on notice that 1985 is the significant date,

1 but by removing the threat of doing something we do not intend
2 to do.

3 Senator Randolph. Gentlemen, I would ask you, not
4 speaking for myself, are you all agreed to coming back
5 this afternoon?

6 Let's discuss this off the record.

7 (Discussion off the record.)

8 Senator Randolph. All right.

9 I would like to raise one point, and, Barry, I want
10 you to discuss this, let's see if this might be a possible
11 approach, if you would kindly listen, Barry, would you go
12 into it?

13 Mr. Meyer. Under Title II, the policy of the Act
14 is implemented by using the words, the application of the
15 best practical water treatment technology before discharge
16 into receiving waters, so they will not migrate to cause
17 water and other environmental pollution.

18 If that language were used in 2(a), 301 2(a), then
19 the relationship of the policy section stays purely a policy
20 section.

21 The goal is the best available technology, which keeps
22 out the pollutants, when it can be done.

23 That will then leave a statement of goals, and the 1985
24 date would stay in, and it would not have any effect.

25 Senator Baker. Could you repeat that?

1 Mr. Meyer. The policy of the Act is it would be set
2 forth in 101, as it is carried out under the Section in 201,
3 with the statement that the objectives in order to accomplish
4 this objective we shall provide for the application of the
5 best available, and you use available waste treatment
6 technology before any discharge into the receiving waters
7 including reclamation and recycling, and confined disposal
8 pollutants, so they will not migrate to cause water or other
9 environmental pollution.

10 If that language was the heart objective for 1981, then
11 the cross reference to Section 101, it has its own definition,
12 and you do not have to worry about a 1985 date on elimination
13 of pollutants, because what we are saying, what you do, is the
14 best you possibly can do, and the best you possibly can do in-
15 cludes the elimination of discharge, then you will do it.

16 Mr. Billings. Who decides it?

17 Mr. Meyer. The Administrator still has to put out the
18 cookbook under 304, so there is no reversal of the burden
19 on publishing the book on what constitutes best technology,
20 and he can define it.

21 Mr. Billings. If these are general guidelines, and
22 you are making decisions on a plant by plant basis, it seems
23 whether or not discharge applies to a single plant, will be
24 made on the basis of the application, are very general guide-
25 lines, and you will not know if a discharge can in fact be

1 implemented, and I believe it is the operator of that plant
2 that has to file the application and show how he intends to
3 meet the requirements under the statute.

4 It is his job, so that I do not see where the reverse
5 burden comes in on this thing.

6 Mr. Billings. If it does make a difference, it--

7 Senator Muskie. Well, this requires examination of
8 no-discharge standard if the technology makes it possible.

9 I really do not see that that change makes any
10 difference.

11 Mr. Meyer. If you use that kind of definition,
12 then you can avoid the cross reference which is what creates
13 the problems as Senator Baker sees them.

14 Senator Boggs. Mr. Chairman, could I get an agreement
15 that we will not vote until we come back at 2:00?

16 Senator Baker will be back here, and he is concerned.

17 Could we get an agreement we will not vote on this
18 say until 2:30?

19 Senator Randolph. That is agreeable with me. I want
20 to accommodate myself to you gentlemen.

21 Senator Muskie. I have appointments this afternoon.

22 Senator Boggs. I am sorry. I did not realize that.
23 I want you here just as much as I want Senator Baker.

24 Senator Eagleton. Could it be written in the report
25 that the language indicates, like most any statement of pur--

1 pose section, that outlines the basic thrust, concept, and
2 general policy the Congress build upon in all of the Act in
3 the succeeding sections what is operable, but that 101 is
4 true, as with every statement of purpose, it is not deemed
5 to be operative as a section?

6 Senator Baker. If I may reply to that, you know the
7 rules of construction, as I do, and I am afraid what would
8 happen, the court will say what we have said many times
9 before, and as they have said, you look only to the statute,
10 the report language has no effect to negate, alter, or
11 amend the express provisions of a statute.

12 Senator Muskie. The only way to resolve this is to
13 vote.

14 Senator Cooper. Page one, when you say is not fit for
15 any purpose, for industrial use, for navigation, and in some
16 cases fit for industrial use, and I suppose in some cases
17 they are fit for navigational use, and so on, it is all there,
18 but of course it could be fit for some purposes, if you have
19 a drought, you could put it on the land for agricultural use.

20 Senator Muskie. Yes, that is too strong.

21 Senator Baker. You have two or three others in
22 here of the same type.

23 Senator Cooper. 3(a), nobody has the right to alter
24 their character.

25 That goes back to whether or not the word alter is the

1 correct word or not.

2 Under the Refuse Act, you alter the character, and
3 any slight change could alter its character.

4 In my own thinking that should be changed.

5 Senator Randolph. I think the thought there, Senator
6 Cooper, indicates the control or the character of these
7 waters must be public control, and that changes might
8 conceivably be beneficial, but who is to make the judgment.

9 The whole idea is to emphasize the point the water wastes
10 are a public resource, and public policy ought to govern their
11 use.

12 Senator Cooper. I understand, but I am trying to
13 ask whether impair or degrade is a more accurate word than
14 alter.

15 Senator Muskie. You listen to the argument of the
16 power companies, even Biscayne Bay, that raising the tempera-
17 ture of that water is a beneficial change, that it does not
18 degrade, and they brought in testimony that the quantities of
19 certain kinds of fish increase, as a result of increasing the
20 temperature, but they do not give any attention to the other
21 defects.

22 Senator Randolph. What did the court do in that
23 case?

24 Senator Muskie. This is testimony before our
25 Committee.

1 Senator Jordan. What would be the bad effects?

2 Senator Muskie. All they focus on is the effects
3 on the quantity of a given kind of fish, but not to the
4 other aspects.

5 Senator Jordan. What others?

6 Senator Muskie. I would be glad to give you the
7 testimony.

8 The only thing I am saying is that there is a change
9 which looks beneficial from some one person's point of view,
10 it is not necessarily going to be beneficial to somebody else
11 making the decision.

12 Senator Jordan. I think it is a matter of being
13 harmful.

14 Senator Muskie. If somebody will have the authority
15 to decide whether a change is beneficial or harmful, are you
16 going to give the public authority with respect to changes,
17 that somebody in private life decides is detrimental.

18 Somebody has to decide whether the changes are good
19 or bad.

20 I am not prejudging it, but who has the authority to do
21 it?

22 Senator Cooper. I think EPA would have the authority.

23 I have another question.

24 On page two, in order to achieve, and so forth, discharge
25 of toxic pollutants, and toxic amounts be eliminated immediate-

1 ed--

2 Senator Muskie. We knocked out immediately.

3 Senator Cooper. In the one under this same paragraph,
4 or section, this charge of industrial pollutants, navigable
5 waters be eliminated by 1985, you leave out the date, why
6 is it comprehensive, why just limit it to industrial pollu-
7 tants, so if there are perhaps the ones that may be the
8 biggest pollutants there, identified as industrialists, I
9 think if you are going to have a goal, then it should be just
10 pollutants in navigable waters be eliminated.

11 Senator Muskie. I have no objection to that.

12 The difference is between industrial pollutants and
13 non-point sources, like agricultural runoff, which we do
14 not yet have the way to control.

15 Senator Cooper. I think the question on this 35 is
16 whether, as I understand Senator Baker, the question he
17 raised, is whether it carries over into the operative
18 enforcement section, where the courts construe it strictly,
19 and I remember in my law, that if the language of the
20 statute is clear, there is nothing for the courts to con-
21 strue, it is only if it is ambiguous, then the court would
22 look to the report, and it would look to the debate, and the
23 only person, this is not criticism of you, but the only person
24 who could give an opinion in the debate would be considered
25 by the court is the opinion of the senator who manages the

1 Bill.

2 Somebody has got to be looked to. The questions are
3 addressed to Senator Muskie, when he is managing the bill,
4 part of the answers, and part of the language for construct-
5 ion, but it is what you say, and what we ask you on the
6 floor, but the main point is, there is nothing ambiguous
7 about it, it says 1985, it is 1985.

8 The court took that view in looking at the operative
9 sections, could use that construction.

10 I think we all agree practically it is not possible.

11 There has been great argument whether you should have
12 a date.

13 I have not got any objection to a date, if it is a goal,
14 because I really believe that people expect you to seek, to
15 correct this situation by a time.

16 If you cannot reach it, you cannot reach it, but I
17 would hope that this section might follow, perhaps, I do not
18 know whether to transpose it, and saying that we find this as
19 a goal, it is our goal to move towards the no-discharge of
20 pollutants by 1985, or something like that.

21 If it can be taken out of the area, of the section,
22 where the courts would say this is part of the law for
23 operation, I think we are all in agreement.

24 We have stated our goal to the Country.

25 Senator Randolph. Senator Cooner, I raise that point

1 discussed this morning with Senator Muskie, as the word
2 policy, as against the word goal, and I know he had some mis-
3 givings, about the use of the word goal, which I suggested,
4 rather than the use of the word policy.

5 As he had indicated, goals were being spelled out
6 along the way, and then we come to the final statement, but
7 I have a concern over it.

8 Now, you have expressed it. I have not discussed it
9 with you.

10 Senator Cooper. Would it weaken your position,
11 Senator Muskie, your case, to say, if you put it in (b),
12 that for the purpose of this Act, and to achieve this goal
13 by 1985, would that create any problems?

14 Senator Baker. No, sir, provided, I am afraid I would
15 have some problem in relying just on the word goal in that
16 context.

17 If you could add to that language, a provision it is
18 fully understood, but so something that amounts to a dis-
19 claimer of an operative section of the statute, say, however,
20 the establishment of 1985, as our goal for accomplishment
21 does not mean nor imply any effect on the operative provisions
22 of the statute.

23 Senator Buckley. I have a rather fundamental concern,
24 and that is based on our present state of knowledge, we can
25 easily suggest that we believe that this goal is achievable at

1 acceptable cost by 1985.

2 Mr. Billings. According to the Administration's
3 figures, 99 percent of all pollutants will only cost \$35
4 billion, which is an annual expenditure of \$3.5 billion.

5 The way it was drafted is a hundred percent of the
6 industrial pollutants--

7 Senator Muskie. If this one sentence, you know, is
8 subject to such fears, why is not other language in the Act
9 which makes it very clear that 1985, as far as that goes,
10 will be interpreted in the light of the information to be
11 developed, as to what no discharge will be, its impact, its
12 cost, all of that spelled out.

13 How you can make the argument you just made, in the
14 light of the fact that the Act in other provisions very speci-
15 fically spelled it out, and it is specific and precise, more so
16 to explain the target of 1985.

17 I do not believe the courts are going to ignore that
18 language in interpreting what Congress meant in respect to
19 this.

20 Senator Cooper. I prefer goals, goals of this Act,
21 consistent with this provision, which is to restore and
22 maintain the natural chemical, biological, physical integrity
23 of the nation's waters.

24 Now, discharge of pollutants consistent with the opera-
25 tive sections, and I think the operative sections then would

1 control.

2 The other day we were discussing definitions of
3 pollutants, and what it means by integrity, and all that, and
4 I think instead of trying to define definitions of all of
5 these things, you start out with a broad statement to
6 prevent discharges, but accept those discharges, which cannot
7 be controlled in the first phase, the second phase and the
8 third phase, and I think that is what it means, instead of
9 trying to define, we are just saying we are against the dis-
10 charges, but we admit some discharges, some effluents can
11 be discharged, those that can be controlled in the various
12 stages.

13 If in either one of these sections you could be
14 consistent with the provisions of this Act, then the provi-
15 sions of the Act would be that which would be the language
16 which the court would have to construe, and that is what we
17 are trying to do.

18 Another thing, it would not eliminate our goal.

19 Senator Baker. You are suggesting that we leave
20 1985 in, but we add consistent with the provisions of this
21 Act?

22 I think that is close.

23 I am thinking out loud, and not stating a position, but
24 I think if you said by 1985, insofar as possible, and consis-
25 tent with this Act, or practicable.

1 Senator Cooper. Consistent with the provisions of
2 this Act, the bill itself has the limits of possibility on
3 each phase.

4 Senator Bentsen. We have then made it subordinate
5 to the act itself.

6 Senator Baker. The only thing that would continue
7 to bother me is any section of the Act which leaves an element
8 of discretion or flexibility by extension of dates or other-
9 wise might still be unrestricted by the term consistent with
10 this Act.

11 I think we have gotten to the root of the problem, but I
12 am not sure that gets all of it, although, I must say I have
13 said about all I am capable of saying.

14 Senator Eagleton. I have redrafted (b) on page two,
15 to read as follows:

16 "The ultimate objective of this Act is to restore and
17 maintain the natural chemical, biological and physical integri-
18 ty of the Nation's waters, and in order to move toward such
19 ultimate objective is hereby declared,"and you go down.

20 Senator Baker. That makes it tougher than it is
21 already.

22 What we are saying then is that the elimination of
23 pollutants be by 1985, that it is a step in moving towards
24 the objective.

25 I think if you said instead of that, you said included--

1 Senator Randolph. Gentlemen, there are several members
2 who have spoken to me informally about their problems at
3 12:30.

4 I wonder if we could set 2:00 o'clock.

5 I understand, Senator Baker, you will not be here just
6 at 2:00, but at 2:15 you can be here, so if that is agreeable,
7 could we return at 2:00?

8 Senator Tunney. I will give my proxy to you, Mr.
9 Chairman.

10 Senator Randolph. I realize our problem, and it
11 is a problem that we all have, collectively and individually.

12 We will meet at 2:00 o'clock.

13 Thank you very much.

14 (Whereupon, the Executive Session was in recess at
15 12:30 o'clock p.m.)

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